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No. 06-1038

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
PETITIONER,

v.

COMMUNITIES FOR EQUITY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. Respondents forthrightly endorse the Sixth Circuit's erroneous standard for presuming an intent to discriminate, and they have no persuasive response to the central point made by MHSAA, *amici*, and the Third, Fourth, Eighth, and D.C. Circuit decisions cited in the petition: that day-to-day decisions implementing the details of single-sex programs do not themselves classify anyone by gender.

The Equal Protection Clause is violated only by intentional discrimination—disadvantages imposed *because of*, not merely *in spite of*, race or sex. Respondents assert that "the scheduling decisions at issue are made by MHSAA explicitly on the basis of the sex of the members of the team." Opp. 15. Respondents seem to believe that if the teams are divided by sex, then any scheduling decisions are necessarily made "on the basis of the sex of the members of the team." To the contrary, it should have been their burden to *prove* that MHSAA selected the schedules it did *because of*, not merely *in spite of* the sex of the teams. Once the teams are separated by sex, *any* mechanism to assign schedules (including a coin flip) will produce advantages and disadvantages that are perfectly correlated with the sex of participants. But that does not mean that advantaging or disadvantaging girls was the *purpose* of the decision. A preference for veterans is not automatically discrimination, even though veterans are overwhelmingly men. *Personnel Adm'r v. Feeney*, 442 U.S. 256, 274-75 (1979). Similarly, a better schedule for the blue team than the red team is not necessarily intentional sex discrimination, even if everyone on the red team is male and everyone on the blue team is female. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

This Court has held that "[c]ertain classifications ... in themselves supply a reason to infer antipathy." *Feeney*, 442

U.S. at 272. If a policy says, on its face, that new uniforms will go to boys first, then it explicitly classifies by sex and no further inquiry is necessary to determine that the boys got the new uniforms *because they are boys*. But if a principal simply purchases new uniforms for one team that happens to be all boys, the reason might not be sex at all; it might be because it has been longer since they got new uniforms, or simply because of a coin flip. To justify a conclusive presumption of discriminatory purpose, something on the face of a policy or statute must show that the policy or statute *itself* is classifying by race or gender.

Respondents argue that "if a school system had separate boys' and girls' high schools, and only the boys' school had science laboratories," that difference in science facilities would be a facial classification even if the separation of the schools by sex were unchallenged. Opp. 16. But the fact that a high school lacks a science lab does not classify anyone by sex, or otherwise conclusively establish that the school board intended to treat students differently *because of their sex*. Perhaps the girls' school is newer, and reflects the district's recent conclusion that science labs are a poor use of facilities or instructional time at the high school level. Perhaps the facility without science labs is also more convenient to a local women's college from which the girls' school will draw frequent guest instructors.

The only reason Respondents' hypothetical has any intuitive appeal is that it is hard to imagine any good reason for a high school not to have science labs, so the example edges perilously close to the *Shaw v. Reno* principle that a simple distribution of benefits and burdens may require an inference of discriminatory intent, even in the absence of any explicit classification, if that distribution is "so bizarre as to permit of no other conclusion." 509 U.S. 630, 646 (1993). But the facts of *this* case do not come close to that line. A decision to schedule the girls' basketball tournament in fall (endorsed by the member schools and numerous witnesses, including the University of Michigan head women's basketball coach) is not so bizarre that it simply

must have been the product of discriminatory intent.

What if, instead of science labs, the alleged "advantage" was that the boys' school had a chemistry teacher with a masters degree? A chemistry teacher regarded as more talented? A gym built more recently with more comfortable bleachers? A great sewing program whereas the girls' school has a better wood shop? Respondents' reasoning, and that of the Sixth Circuit, is that *any* difference between single-sex facilities or programs is a facial classification from which discriminatory intent must be presumed. The Sixth Circuit tried to temper the breadth of that error by claiming that differences are only facial classifications if they "result in unequal treatment." Pet. App. 30a. But that supplies no limiting principle at all. Someone can always claim that a difference is unequal for some reason, as illustrated by the district court's extensive and subjective analysis of the advantages and disadvantages of playing these sports in particular seasons. The relevant inquiry is not whether a particular difference is better or worse, but whether it supplies a basis for presuming, without any other proof, that the defendant made a deliberate decision to allocate benefits *because of*, not merely *in spite of*, the sex of the recipients. The Sixth Circuit's standard does not address that question at all, and the result is that the lower courts have completely relieved the plaintiffs of their burden of proof.

2. Neither of the courts below ever found that MHSAA chose the schedules it did because of, not merely in spite of, any disparate impact by sex—and the record does not contain evidence from which any reasonable factfinder could reach that conclusion. Respondents' only argument (and the courts' only holding) has been that no proof of intent is necessary, because discriminatory purpose is presumed.

The record is full of testimony that MHSAA's current schedules provide the best alternative for the greatest number of female athletes. The University of Michigan head women's basketball coach testified that MHSAA's schedule is "more convenient" for recruiting and provides "more visibility for Michigan's girls to be recruited." Pet.

App. 94a. Kathy Lindahl, the former associate athletic director at Michigan State, testified that she had "a passion for girls and women in sport," and had "dedicated basically my whole career and life" to girls' athletics, and believed the current schedules provide "an advantage" for all students. CAJA 4435-36. Several girls' coaches testified that "the girls programs are flourishing a lot more than the boys," CAJA 4646, the "current alignment of seasons allows us to have two to three times more matches than most other states," CAJA 4513, and "in the 13 years I've been coaching the girls, the participation for girls has more than doubled." CAJA 4604. The district court disagreed with that testimony and found that, in its opinion, the current schedules in these six sports are net disadvantageous to girls. The court never found, however, that MHSAA chose these schedules *because it believed* they would disadvantage girls. The evidence of good faith disagreements makes that conclusion impossible.

The district court and Sixth Circuit did observe that, in their opinion, the girls were forced to bear "all of the burden of playing during disadvantageous seasons" among the six sports examined. Pet. App. 64a. MHSAA sponsors tournaments for girls only in 14 sports and another 14 tournaments for boys in which girls may compete.[1] CAJA 2004. Respondents picked these six particular girls' sports to focus on, but neither they nor the courts below ever attempted to evaluate the *overall* programs to determine whether girls have been forced to bear all, or even an unfair proportion, of the discretionary decisions that might be termed "disadvantageous."[2] (And even among these six,

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[1] The petition indicated that girls may play on boys' teams only where there is no parallel girls' team. In fact, girls may (and do) play on any boys' team. CAJA 2004 (text of rule does not exclude girls from any tournament). For example, last year 104 girls played on boys' tennis teams, and 193 girls played on boys' wrestling teams. *See* participation figures at http://www.mhsaa.com/resources/administration.htm.

[2] The district court's suggestion in the remedial context that it would accept as a remedy any distribution of seasons *in these six sports* that it

boys are not offered volleyball at all; the district court found that the girls' volleyball seasons were "discriminatory" by comparing them to the seasons used by girls in other states). The courts below certainly did not infer discriminatory intent from any suspicious pattern of decisionmaking, and could not have on this record. The point of their reasoning was that no inference or proof of intent is necessary, because the decisions here qualify as "facial classifications."

Neither could any presumption of discriminatory intent be based on the evidence that MHSAA sought to minimize overall disruption of the pre-existing tournaments when it began adding new tournaments for girls in 1972. When girls' tournaments were added over time, MHSAA was entitled to take into account both that putting the tournaments at the same time would create resource conflicts in certain sports, *and* that moving the existing boys' tournaments around each time a girls' tournament was added would disrupt the overall program. *See, e.g.*, Tennis Coaches Ass'n Br. 2 (moving seasons can force students to choose between two favorite sports they have been playing for years). Both are entirely gender-neutral considerations relating to logistics and administrative convenience. At the time each tournament was added there were ample, gender-neutral reasons for scheduling them this way, including (as Respondents themselves have advocated) ensuring there were adequate opportunities for girls during each season. For example, when MHSAA added a girls' basketball tournament in 1972, many schools were already scheduling their girls' teams in the fall. CAJA 4233. The fall created fewer resource conflicts than if the seasons were wedged together, and MHSAA reasonably concluded there was nothing outweighing the massive disruption that would occur to *both* genders if the seasons were shuffled.[3]

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regarded as "equitable," *see* Opp. 9, 20, suffers from the same flaw. Indeed, the district court rejected MHSAA's first compliance plan and ordered the basketball and volleyball seasons switched. CAJA 1856-58.

[3] Neither the Blue Star nor Nike shoot-outs even existed in 1972, and the NCAA "March Madness" was just beginning to develop popularity.

MHSAA has also repeatedly polled its member schools to gauge their willingness to incur these disruptions, and the schools have repeatedly voted in favor of the current seasons. *See* Pet. 3. Implementing the votes of its member schools is another gender-neutral basis for decision.

Respondents claim that MHSAA is attacking the district court's findings. Opp. 7 n.5. MHSAA's point is that those findings answer the wrong question, as a matter of law. The district court made subjective "findings" about the best time to play sports, deciding for example that it is better for some sports to start in warm weather and end in cold, and in other sports the opposite. Some of those findings are indefensible on their own terms, *see, e.g.*, Tennis Coaches Ass'n Br. 4, but more importantly these issues are legally relevant *only* to the extent they might shed some light on MHSAA's intent. The district court never made *any* finding on the only issue that matters: whether MHSAA scheduled the tournaments as it did because of, not merely in spite of, the sex of the teams. Its subjective disagreement with the University of Michigan women's basketball coach about the best time to play basketball is barely relevant to the actual legal issues here.[4]

3. Other circuits have correctly placed the burden on plaintiffs in cases like this one to prove discrimination.

Respondents claim that in the Eighth and D.C. Circuit prison cases the plaintiffs were challenging "facially neutral" rules. Opp. 22. The plaintiffs in those cases did not think so; they argued that differences in programs between men's and women's prisons were facial classifications. The circuit

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Regardless, high school educators are entitled to design their athletic programs to serve *educational* goals, such as maximizing participation and minimizing resource conflicts. It is not discrimination if MHSAA concludes those goals are more important than shoe company shoot-offs.

[4] The district court only found, under an incorrect burden of proof, that MHSAA had not satisfied its burden of demonstrating there were not disadvantages. *See* Pet. 6-10. In any event, the issue is the district court's legal characterizations, not any resolution of disputes of historical fact. *See Grutter v. Bollinger*, 539 U.S. 306, 338-43 (2003) (adopting characterizations different from trial court's conclusions).

courts disagreed, and for exactly the same reason the Sixth Circuit should have reversed here: differences in the boys' and girls' schedules are *not* facial classifications simply because there are separate teams, just as differences in prison programs are not facial classifications simply because there are separate prisons. Scheduling seasons to minimize overall program disruption is no less neutral than allocating prison industries based on the availability of a steady work force. *Keevan v. Smith*, 100 F.3d 644, 651 (8th Cir. 1996).[5]

Both the Fourth Circuit and this Court in *VMI* examined the overall educational experience offered by the two schools. *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995); *United States v. Virginia*, 518 U.S. 515 (1996). The Third Circuit similarly focused only on overall equality in *Vorchheimer v. School District*, 532 F.2d 880 (3d Cir. 1976)—a case on all fours with Respondents' own science labs hypothetical. The Third Circuit held that separate male and female public high schools were constitutional when the "academic facilities [we]re comparable, with the exception of those in the scientific field where [the boys' school's] are superior." *Id.* at 882. As Respondents point out, those cases were challenges to the overall separation, not to specific aspects of the programs. But the cases were litigated that way because only the separation is a facial classification. Neither this Court nor the Fourth Circuit in *VMI* treated each individual difference as a separate facial classification requiring its own "exceedingly persuasive" rationale.

4. The Sixth Circuit's erroneous decision to presume discriminatory intent also requires reversal of the Title IX ruling. The Sixth Circuit's *only* analysis under Title IX was to endorse the district court's conclusion that discriminatory intent may be presumed under Title IX for the same reasons as under the Equal Protection Clause. Pet. App. 32a-33a.

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[5] Respondents attempt to minimize the facial classification holdings by noting that those courts had also found the male and female inmates were not similarly situated. Opp. 21. But those alternative holdings are equally as binding as ones providing the exclusive basis for decision. *See Massachusetts v. United States*, 333 U.S. 611, 623 (1948).

Respondents assert that MHSAA should not be allowed to challenge the Title IX ruling because it previously had argued it was not subject to Title IX. MHSAA did argue that it was not subject to Title IX, but that argument was rejected by the district court. If the courts are going to insist that MHSAA is subject to Title IX, MHSAA is entitled to defend itself under that framework—as the Sixth Circuit recognized by reaching the merits of this issue.

Respondents suggest MHSAA could violate Title IX "without regard to ... animus towards the disadvantaged gender" under a disparate impact theory. Opp. 24. But the district court correctly dismissed all disparate impact claims under Title IX on the ground that such claims are not enforceable in a private suit after *Alexander v. Sandoval*, 532 U.S. 275 (2001). CAJA 935. Respondents did not appeal that ruling. Thus the only Title IX claims remaining *in this case* require proof of intentional discrimination.

Respondents attempt to supply a Title IX analysis that is absent from the opinion below by pointing to regulations regarding the scheduling of practices and games. Opp. 13. But those regulations are relevant, if at all, only because they provide another basis for reversing the Title IX ruling. The regulations (not even cited by the Sixth Circuit) require an evaluation of ten factors, only one of which is "scheduling of games and practice time." 34 C.F.R. § 106.41(c). Even that factor requires analysis of many criteria, and *does not even mention the time of year when sports are played. See* 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

5. Respondents argue that the state law ruling provides "an independent state law ground for the trial court's decision." Opp. 13. There is nothing "independent" about the Elliott-Larsen Act claim. *Cf. Michigan v. Long*, 463 U.S. 1032, 1039 (1983). Both the district court and the Sixth Circuit correctly recognized it incorporates the federal Equal Protection standard. Pet. App. 165a ("[T]he standard for decision under Plaintiffs' [Elliott-Larsen Act] claim is the same as under their Fourteenth Amendment claim."); Pet. App. 35a (adopting the district court's analysis). That is

entirely consistent with the Michigan Supreme Court's holdings. In *Michigan Dep't of Civil Rights ex rel. Forton v. Waterford Twp.*, 387 N.W.2d 821, 828 (Mich. 1986), the Michigan Court held that Michigan's legislature intended the Elliott-Larsen Act to redress the "concept of discrimination enunciated by the U.S. Supreme Court with respect to equal protection under the Constitution." The court held that "[i]n evaluating whether these classifications by gender amount to impermissible sex discrimination under" the Elliott-Larsen Act, the Michigan Constitution, and the federal Constitution, "the standard to be applied is the same." *Id.* at 829. Reversal of the Equal Protection ruling compels reversal of the Elliott-Larsen ruling as well.[6]

6. The *Sea Clammers* question is squarely presented, is the subject of an acknowledged three-to-three split, and is straightforward: the Sixth Circuit, and two other circuits, have held that the comprehensive private right of action this Court identified in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), is irrelevant to whether Title IX precludes § 1983 claims. But in deciding whether a statute precludes claims under § 1983, "[t]he crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). This Court held in *Cannon* that Congress intended to establish a private right of action to enforce Title IX. Pet. 27; *Cannon*, 441 U.S. at 694. And *City of Rancho Palos Verde v. Abrams* confirms that the "ordinary inference" from the existence of a private judicial remedy is that Congress intended it to be exclusive. 544 U.S. 113, 122 (2005).

The Second, Third, and Seventh Circuits have all correctly held that the private right of action recognized in *Cannon* requires application of the *Sea Clammers* doctrine. Pet. 28-29. They have also correctly identified that Title

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[6] Respondents claim MHSAA failed to preserve its challenge to the state claim. Opp. 13. They have been making that argument for over three years, and no court has agreed. It is so specious the panel below did not even mention it when it addressed the state claim on the merits.

IX's statutory regime is inconsistent with parallel litigation under § 1983. *Id.* For example, the prohibition on punitive damages under Title IX, *see Barnes v. Gorman*, 536 U.S. 181, 188-89 (2002), cannot be reconciled with the existence of such damages under § 1983.

This Court is certainly free to grant review only of the intentional discrimination question.[7] But the preclusion question is squarely presented and is the subject of an entrenched circuit split. This Court has the power to review this threshold issue in the course of resolving this case, and there are powerful reasons to do so. *Cf. Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985-86 (2005) (deciding threshold issue that had caused "genuine confusion in the lower courts," although "not, strictly speaking, necessary to our disposition").[8]

7. As the amicus briefs attest, Michigan's educational establishment strongly believes the current schedules provide the best athletic opportunities for all students. *E.g.*, Mich. Ass'n Sch. Bds. Br. 5-9. The Sixth Circuit has undermined that judgment as well as a wide range of good faith efforts by educators to promote gender equity. Nat'l Fed. State High Sch. Ass'ns Br. 2. And since "[t]he list of possible distinctions is, quite literally, endless," Alabama Br. 7, the Sixth Circuit has effectively made all single-sex programs presumptively unconstitutional.

CONCLUSION

The petition for certiorari should be granted.

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[7] Respondents' argument that MHSAA has waived its *Sea Clammers* argument is meritless. This Court GVR'd in light of *Rancho Palos Verdes*, which is a *Sea Clammers* case. The Sixth Circuit proceeded to address the *Sea Clammers* issue on the merits. Thus, both this Court and the Sixth Circuit have resolved the waiver argument in MHSAA's favor.

[8] Respondents suggest the split may work itself out following the Sixth Circuit's opinion. Opp. 29. But as the dissent below recognized, *Rancho Palos Verdes's* "ordinary inference" standard makes the case for preclusion even clearer. Pet. App. 46a. There is no reason to think other circuits will change course, and the ruling below strengthens the split.

Respectfully submitted,

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